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SUPREME COURT U. S.

(20,196)

No. 253

(OCTOBER TERM, 1906.)

IN THE

Supreme Court of the United States

R. G. STONE, R. M. FINLEY and NANNIE E. FINLEY,
Plaintiffs in Error.

vs.

SOUTHERN ILLINOIS AND MISSOURI BRIDGE COMPANY,
Defendant in Error.

Suit to Condemn Land for a Bridge Approach.

In Error to the Supreme Court of the State of Missouri.

Petition of Plaintiffs in Error for Rehearing.

MADISON R. SMITH,
THOMAS T. FAUNTLEROY and
SHEPARD BARCLAY,
Attorneys and of Counsel for Plaintiffs in Error.

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PETITION OF PLAINTIFFS IN ERROR FOR REHEARING.

It is sometimes an imperative duty to ask a reconsideration of a judgment in Courts of the highest authority. In the development of jurisprudence the petition for rehearing has become a necessary evil. It is a helpful and friendly motion, when made in the proper spirit; and is always welcome to those patient judges who, like your Honors, are willing to give due time to the settlement of the problems presented by the court records of to-day.

In the case at bar, the circumstances in which Court and counsel were placed when it was reached for argument, did not afford the usual time for its discussion. Plaintiffs in error were necessarily limited to less than an hour, and only by the great courtesy and kindness of the Court was so much time available.

There are some new questions in this record which, we respectfully submit, should receive further attention, despite the evident care and thought already bestowed upon them. With the utmost respect for the Court and for all its members, we beg to offer a few suggestions in support of this

Petition for Rehearing.

The plaintiffs in error have been singularly unfortunate in failing to present some of their most serious contentions in a manner to command the attention of the Court. Some of these contentions involve far-reaching consequences; the learned opinion herein denies them, and we invoke a further consideration of some of them whose merits have deeply impressed us.

A Mistake of Fact.

The learned opinion inadvertantly approves a mistake of fact appearing in the learned brief for defendant in error, wherein that brief avers (p. 36), that

> "The 720 feet, where the approach required by the War Department ends, is some sixty feet from the ground."

For the learned opinion declares:

> "This record shows that the point, 720 feet to the west, where the approach required by the War Department ends, is at a height of some 60 feet from the ground."

The drawing and plan (Transcript, p. 68) sanctioned by the Chief of Engineers and Secretary of War, indicate that the official, approved approach, as a part of the Bridge, *reached the ground,* and does not end at a height of some 60 feet above it. The testimony shows that, while the western end of the approach is some sixty feet above the level of the *river,* that end is likewise in the bluff or hill, within 700 feet of the river, as indicated on the official drawing. A number of witnesses (including the engineer of defendant in error), attest these facts and declare that the hill or bluff on the Missouri side is about 700 feet from the water's edge, and that the western terminus of the approach, (as marked on the government drawing) is in the hill or bluff, so that the contemplated and authorized bridge is a complete structure, and not an imperfect piece of abortive engineering, ending "*in the air,*" as defendant in error appears to intimate, contrary to the undisputed testimony. (Printed Transcript, pp. 24, 27, 28, 30, 42, 48).

LIMITATION OF STATE POWER AND THE REASON THEREOF.

The leading contention of plaintiffs in error is that the State law of Missouri was invoked to condemn their land, solely and only by authority of the Act of Congress and subject to its terms.

THE PETITION

of defendant in error, by express words, limited the process of law thereby invoked to "*the territorial limits and conditions in said act set out.*" (Printed Transcript, p. 5.)

The taking of the land of plaintiffs in error was not

asked under *any other authority* than the Act of Congress itself.

The learned opinion on this point says:

> "We cannot find it within the purpose of Congress, if it had the power so to do, by the terms of this act, to limit the State in its right to authorize these necessary terminals and connecting facilities, because the plans and specifications, which fully subserved the purpose of showing the extent to which navigation would be affected had been specifically approved by the Secretary of War, and are not to be altered without his consent."

But we submit, with the utmost respect, that we have never claimed that the State of Missouri did not have power to subject this land to public use for "*necessary terminals and connecting facilities,*" by proper proceedings under her laws authorizing railroad lines and other terminal facilities to be constructed. (R. S. Mo., 1899. (Chap. 12, secs. 1035. 1051, 1061, 1264-1273.)

Our contention was, and is, that the Missouri law cannot subject land to condemnation *as a bridge* beyond the limits defined by Act of Congress, when the latter had *forbidden* such action by declaring that the "bridge, approaches and accessory works" shall "be a *lawful structure, only* when built in accordance with the plans as recommended by the said board of engineers, and approved by the Chief of Engineers," and the Secretary of War (31 U. S. St. L. 741, ch. 181, sec. 7. and 30 U. S. St. L. 1151).

Our respectful insistence is that the purpose of this legislation of Congress is to inhibit absolutely action by any State authority in the matter of erecting bridges

across navigable waters, except in subordination to the plans sanctioned by the federal authority. And that those plans, and the federal limitations as to *"lawful structures"* of that class, constitute an immunity to plaintiffs in error against the taking of their land for the purposes of such a bridge, over navigable waters, in a case like this, where the *pleading* which lies at the root of the case asks that the land be taken

> "Under an act of Congress entitled an act to authorize the Construction of a bridge across the Mississippi River at or near Gray's Point, Missouri, approved January 26th 1901; That the same is being constructed *within the territorial limits and conditions in said act fully set out.*"

Doubtless, by appropriate steps, the land sought to be taken in this case, outside the boundaries marked by the Company's *own* drawings and plans (approved by the Secretary of War) could be subject to public use for terminal railway purposes under Missouri laws. We have never denied that proposition. We have no complaint to make this ruling in the learned opinion:

> "If the State was deprived of its power to authorize extensions and connections which should make this bridge available for the common use of railroads for which it was intended, it would have been a vain thing to provide for a bridge abruptly terminating at a height and point where, without further approaches and connecting facilities, its usefulness would have been destroyed."

We certainly had no idea of asserting the opposite of that declaration. Terminal railroads to connect with the bridge as outlined, *inexorably,* by the federal

plans, could be authorized and constructed under State law, but *not as part of a bridge* defined by plans under federal sanction and only "lawful" by force of the federal authority, as the petition of defendant in error at the outset of the case conceded by most definite language.

We believe that there is deeper force than has been given our claim that the intent of the federal legislation forbidding (as unlawful) such structures except as authorized by the federal plans (approved by the revising officers) would be frustrated if proceedings, such as here appear, receive the final sanction of this High Court.

The subject involved is well worthy a second hearing, lest some inadvertant error might occur which would return in later days to vex your Honors in other applications of the decisive principle controlling the case at bar. We contend that the express federal warrant to erect the bridge and approaches in the exact mould prescribed by the method marked out by these national acts (which alone are alleged as the source and limit of authority by the petition beginning the suit), constitute likewise an *exclusion* of authority in any State to authorize the taking of land otherwise, as part of the "*bridge, approaches* and *accessory works.*" (Sec. 7.) The expression of the power and of its limitations is the exclusion of other powers unexpressed; and especially in view of the imperative mandates of emphasis in the Acts themselves:

> 'The proposed bridge shall be a lawful structure only when built in accordance with the plans," etc. (sec. 7.)
>
> * * *
>
> "It shall not be lawful to deviate from such plans either *before or after completion* of the

structure, unless the modification of such plans has *previously* been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

(30 St. L., p. 1151, sec. 9.)

These acts of Congress will be frustrated if State laws of condemnation may be used, nevertheless, to take land for a bridge approach, under the sole authority of those acts and *"within the territorial limits and conditions in said act fully set out,"* but beyond the territorial limits of the federal plans, which alone define the boundaries of the *"lawful structure."* Does this mean less than that any other structure is an *unlawful structure,* and hence is forbidden as part of the authorized "bridge, approaches and accessory works?"

The necessary parts of such a bridge, its approaches, tracks, etc., are treated as a unit—each and all are lawful when made so by federal sanction.

Railway v. Railway, 163 U. S. 588.

But the corollary is equally potent—those parts which are sought to be constructed as lawful must be within the scope of the federal sanction given to the entire structure. Whatever is beyond the limits defined by the approved plans cannot be made a part of the "bridge, approaches, and accessory works" by the act of any one State alone.

Purposes of Federal Exclusiveness.

With all due respect we suggest that the learned opinion inadvertently omits to give due weight to one of our most vital contentions, as witness the following comment on the purpose of the federal legislation concerning bridges:

> "It is evident that the purpose of requiring the submission of plans, and their approval by the Secretary of War, was to preserve, as far as may be. *the unobstructed passage of the river in the uses of navigation.* To the extent that it was necessary to protect such interests, the law provides that the structure shall be unalterable, and that its approaches shall be approved by the Secretary and remain unchanged without his sanction."

We suggest, most respectfully, that other great purposes, beyond the preservation of free navigation, are outlined by the federal legislation on the subject of bridges; and that those great purposes are well worthy of further consideration.

The acts themselves disclose those purposes to be to protect the government and the public, and competing railroads against the possibility of extortion in tolls and charges for the use of the "bridge, approaches and accessory works" as defined by the plans. The power to fix "reasonable compensation" for the use of the tracks by other railroads etc., and to regulate the "reasonable tolls" for the passage of vehicles, animals and passengers is vested in the courts, and in the Secretary of War (Secs. 1, 2, 9; See our 1st Brief, pp. 12, 13, 16). These provisions are for the protection of the rights of others interested, beyond the bridge owners. The area within which these powers to regulate tolls and charges must be operative is that defined by the plans which trace the lines of official boundaries of the bridge. Here is a corporation of Illinois, building a bridge in Missouri, under the sole sanction of federal statutes, which require the area of the "bridge, approaches and accessory works," to be drawn by the owner, and approved by the govern-

ment. When those lines have been drawn, are they not the limit of federal control and supervision and regulation of the tolls and charges for various uses of the bridge by others than its owner?

Here is a definite purpose indicated by this legislation of greater import in these days than is the protection of navigation of the river. The circle traced by Cardinal Richelieu in the name of Rome was not more significant than is the limit marked by these federal laws to define the scope of the bridge and the field of federal regulation of the bridge charges and tolls. To allow any State to take land for the federal bridge, and while binding it thereto leave the final structure exempt from federal control in the matter of charges and tolls within the territory *beyond the lines defined by the plans*, approved by the federal authority, would present an anomaly which, we submit with the greatest respect, was not intended by the federal acts under review. The idea of a bridge, as contemplated by the existing law, is that of an area defined by the federal authority alone, and subject, within the lines of definition, to control for just purposes by federal authority. Such a bridge was not intended to be Siamese twins, part State and part federal. It was not intended to owe a divided duty to state and federal governments, part to one and part to the other master. Only when built to conform to the plans of federal sanction is it a "lawful structure." A bridge to-day is a great artery of interstate commerce—a bond to unite the business of many states. The law of the United States deems worthy of attention the regulation of bridge charges in the interest of the public. To give effect to that purpose the bridge as marked by the federal

plans is the limit of the lawful structure. Anything else is unlawful.

If we might be permitted to paraphrase the great masterpiece of *Sir William Jones,* to impart our idea of a bridge as contemplated by federal law, we would say:

WHAT CONSTITUTES A BRIDGE?

What constitutes a Bridge?
Not merely trusses. girders, labored mound,
Approach by well-formed ridge;
Not masonry and beams with trestle crowned;
Nor tracks and piers alone
Where, laughing at the States, proud railroads run
In fancied immune zone,
Where none may check their power 'neath the sun.
No! Area of law and right,
With vital powers of equity endued,
Where all a Nation's Might
May curb Monopoly and her fierce brood;
A sweet domain of peace,
Where "reasonable tolls" maintain their sway,
And all extortions cease,
While national justice brightens every day;
These constitute a Bridge!

The spirit of the law is the life of the law. To us it has seemed clear that the spirit of the federal legislation under review is alive with suggestions of a settled purpose to *forbid* an enlargement of territorial limits of the "*bridges, approaches and accessory works,*" (as ascertained by the approved plans), by means of any action or measure, judicial, legislative or executive, of any State or person, except the National government, and that the effort to accomplish such a

result in this case, and to extend the bridge and its approach *without previous federal authority,* had no other effect than to make the *extension* an "unlawful structure," according to the very terms of the federal statute.

A Large Question.

Are we right in saying that the questions in this case are of deep import? They are far-reaching, and should receive, we respectfully insist, such full discussion as will satisfy your Honors that no phase thereof has been overlooked. For our part, we believe that a rehearing would be of advantage, and permit us to submit further authorities and arguments tending to sustain our contentions. The present term of Court was so near its close when the learned opinion was filed and we obtained a copy thereof, that adequate time has not intervened for preparing a Brief in support of this petition. We therefore pray the indulgence of the Court to accord to us a *reasonable time after adjournment* to file such a brief. and to that end we have filed a motion for

Special Leave.

Of that motion we respectfully ask your Honor's consideration and such action as may appear to be just in the circumstances.

No hardship could possibly result from the fullest consideration of this cause which your Honors may deem appropriate thereto.

For convenience of reference we reproduce our said motion for reasonable time to submit our brief herein.

(Caption, title of cause, omitted.)

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING.

Now come plaintiffs in error by their attorneys and move this Honorable Court to grant them leave to file a petition for a rehearing within a reasonable time (say, sixty days), after the adjournment of the Court for the October Term, 1906, because a copy of the learned opinion of the Court was not received by counsel for plaintiffs in error until May 20, 1907, and said opinion was filed only a short while previously.

No adequate time to prepare such a petition has intervened.

Counsel for plaintiffs in error pray the indulgence of the court to accord them a reasonable opportunity to present their petition and *brief in support theerof, after the adjournment,* assuring the Court that, in their opinion, substantial grounds can be shown for granting such a petition.

SHEPARD BARCLAY,
Of Counsel for Plaintiffs in Error.

St. Louis, Mo., May 23, 1907.

The undersigned of Counsel for plaintiffs in error hereby certify that the foregoing motion is not interposed for delay, but because, in his opinion, there are substantial grounds, well founded in point of law, for a petition for a rehearing of said cause.

SHEPARD BARCLAY,
Of Counsel for Plaintiffs in Error.

CONCLUSION.

We earnestly and most respectfully pray that a rehearing be accorded to the plaintiffs in error to permit a fuller discussion and examination of the questions arising on this record. We appreciate the faithful labor your Honors have already given to the case. We trespass further on your courtesy only from strong conviction of the merits of our contentions, and from a desire to be as helpful to your Honors as our ability will permit.

As counsel we further certify that this petition is not interposed for delay, but because, in our opinion, it is well founded in point of law, and because we believe that a rehearing would subserve the ends of justice.

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